UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ADEKUNLE OLOBA-AISONY, Petitioner, v. L.E. SCRIBNER, Warden, Respondent.	NO. CV 06-4976-SGL(E) ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. section 636, the Court has reviewed the Petition, all of the records herein and the attached Report and Recommendation of United States Magistrate Judge. The Court approves and adopts the Magistrate Judge's Report and Recommendation.

IT IS ORDERED that Judgment be entered denying and dismissing the Petition with prejudice.

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IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein by United States mail on Petitioner and counsel for Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: 3-31, 2008.

STEPHEN G. LARSON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ADEKUNLE OLOBA-AISONY, Petitioner, v. L.E. SCRIBNER, Warden, Respondent.	NO. CV 06-4976-SGL(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Stephen G. Larson, United States District Judge, pursuant to the provisions of 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

Petitioner filed a "Petition for Writ of Habeas Corpus By a Person in State Custody" on August 10, 2006, challenging Petitioner's conviction in Los Angeles Superior Court case number GA049677 ("Petition I"). On October 19, 2006, Petitioner filed another habeas

corpus action, Oloba-Aisony v. Scribner, CV 06-6652-SGL (E), challenging the same conviction on additional grounds ("Petition II"). On October 24, 2006, the Court issued an order consolidating the present action with Oloba-Aisony v. Scribner, CV 06-6652-SGL (E), and ordering Respondent to file a single Answer to the consolidated Petitions. On January 8, 2007, Respondent filed an Answer. On March 30, 2007, Petitioner filed a Traverse.

In Petition II, Petitioner contends that the sentencing court imposed an upper term sentence in violation of Blakely v. Washington, 542 U.S. 296 (2004) ("Blakely"). In the Traverse, Petitioner contends the sentencing court imposed an upper term sentence in violation of Blakely and Cunningham v. California, 127 S. Ct. 856 (2007) ("Cunningham") (see Traverse, pp. 55-61). On April 4, 2007, the Court issued an Order to Show Cause, requiring Petitioner to show cause why the Court should not require further exhaustion of Petitioner's challenge to his sentence in light of Cunningham. On May 25, 2007, the Court issued an order staying the consolidated Petitions pending exhaustion of Petitioner's challenge to his sentence.

On December 11, 2007, Petitioner filed a "Motion Requesting That Petitioner's Stay Be Lifted." By order filed December 12, 2007, the Court lifted the stay and took the consolidated Petitions under submission.

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BACKGROUND

A jury found Petitioner guilty of: (1) the forcible rape of Tiana W. (Count 1); (2) sexual penetration of Tiana W. by a foreign object (Count 2); (3) attempted forcible oral copulation of Tiana W. (Count 3); (4) three counts of felony false imprisonment by violence of Tiana W., Ashley B. and Brittany H. (Counts 4, 5 and 10); (5) three counts of misdemeanor battery of Yana J., Cheryl J. and Lauren C. (Counts 7, 11 and 12); (6) assault of Brittany H. with intent to commit a felony (Count 8); and sexual battery by restraint of Brittany H. (Count 9) (Clerk's Transcript ["C.T."] 257-68, 271-74; Reporter's Transcript ["R.T."] 1804-11). The jury acquitted Petitioner of the alleged battery of Amy B. (Count 6) (C.T. 262, 272-73). Petitioner received a prison sentence of ten years (C.T. 275-83; R.T. 2126-31).

The Court of Appeal affirmed the judgment (Respondent's Lodgment 6; see People v. Aisony, 2003 WL 22792349 (Cal. Ct. App. 2d Dist. Nov. 25, 2003). On February 18, 2004, the California Supreme Court denied Petitioner's petition for review without opinion (Respondent's Lodgment 8).

Petitioner filed a habeas petition in the Los Angeles County Superior Court, which that court denied on May 20, 2004 in a brief, one-page order (Respondent's Lodgments 9, 10). Petitioner filed a habeas petition in the California Court of Appeal, which that court denied summarily on September 14, 2004 (Respondent's Lodgments 11, 12). On October 7, 2004, Petitioner filed a habeas petition in the California Supreme Court, which that court denied without opinion on

August 31, 2005 (Respondent's Lodgments 13, 14).

On November 30, 2004, Petitioner filed a second habeas petition in the Los Angeles County Superior Court, which that court denied on the same date (Respondent's Lodgments 15, 16). On January 6, 2005, Petitioner filed a second habeas petition in the California Court of Appeal, which that court summarily denied on September 13, 2005 (Respondent's Lodgments 17, 18). On November 1, 2005, Petitioner filed a second habeas petition in the California Supreme Court, which that court summarily denied on August 2, 2006 (Respondent's Lodgments 19, 20).

On June 15, 2007, Petitioner filed a third habeas petition in the California Supreme Court,[1] which that court denied on November 28, 2007 (Petitioner's exhibit to "Motion Requesting That Petitioner's Stay Be Lifted").

SUMMARY OF TRIAL EVIDENCE

The following factual summary is taken from the opinion of the California Court of Appeal in People v. Aisony, 2003 WL 22792349 (Cal. Ct. App. Nov. 25, 2003). See Galvan v. Alaska Dep't of Corrections, 397 F.3d 1198, 1199 & n.1 (9th Cir. 2005) (taking factual summary from

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[1] The record does not contain this petition. However, the Court takes judicial notice of the docket in In re Oloba-Aisony, California Supreme Court case number S153840, available on the California courts' website at www.courtinfo.ca.gov. See Mir v. Little Company of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988). That docket shows Petitioner filed the petition in that case on June 15, 2007.

state appellate decision).

FACTS

Counts 1-4 re Tiana W.

Tiana W., then age 17, met appellant several times walking on the street in the neighborhood where they both lived in Pasadena. In March of 2002, Tiana met appellant at a bus stop. Appellant told her his name was "Kule," showed her his passport and a blue passbook, and told her he was a Nigerian prince with lots of money. Tiana gave him her cell phone number. Appellant called her on March 12, 2002, the day before her 18th birthday, and told her he wanted to meet her at the corner of Grandview and Marengo to give her a birthday gift.

Tiana met appellant, who told her he wanted to give her $1,000. Appellant had an envelope containing money with him, but he did not want to give her the money at that time. Tiana was on her way to meet her boyfriend and told appellant that she would call him when she got back. Later that evening, she spoke with appellant who again asked to meet her.

Tiana again met appellant at the corner of Grandview and Marengo. They walked until they were under a bridge.

Appellant tried to hug and kiss Tiana, but she pushed him away told him, "What are you doing? Move. I'm not an affectionate person." Tiana also told appellant she did not like him "like that." When appellant asked if he could "lick" her, she said, "No. Just leave me alone." When appellant became more affectionate and aggressive, she told him, "Stop. No. Move."

Appellant then pulled down Tiana's sweat pants, shorts, and underwear and tried to lick her. Tiana pulled her clothing back up, but appellant pulled them down again. Appellant twisted Tiana's wrist and held her leg. She told him to stop and kept telling him "Stop. What are you doing? You're raping me." Appellant told Tiana, "You can go ahead and yell all you want to. No one is going to hear you." Tiana was scared and nervous and began to cry. She protested to appellant, "Don't do this to me," but he removed everything she was wearing below her waist and threw it to the side.

When appellant attempted to put his tongue into her vagina, she put her legs together so he could only put his tongue on her pubic hairs. But appellant then put his finger inside Tiana's vagina and asked her to let him "just rub my penis on you." Appellant put on a condom, Tiana again protested, and appellant started rubbing his penis on her. When she held his penis and rubbed it on herself in an effort to satisfy appellant so he would leave her alone, appellant

told her, "No. No. That's not good enough."

Appellant then grabbed Tiana's feet, laid her on the ground, and pushed his penis inside her vagina. Appellant kept "jamming" himself into her until he ejaculated. He got up, threw the condom away, and told Tiana not to tell anyone what had happened and that he would transfer $10,000 into her account.

Tiana ran home, showered, and then told her cousin what had happened. Her cousin told her to call the police and dialed the number for her. The police arrived and brought her back to the scene of the rape where they took pictures and recovered the condom. Tiana was taken to a hospital and examined. She had some swelling, redness, abrasions and a laceration in the vaginal area consistent with her having been raped earlier that evening.

Count 5 re Ashley B.

In February of 2002, Ashley B. was sitting in front of a fountain at the University of Southern California where she was a student. Appellant approached Ashley, stated he was producing a television show, and asked her if she had ever done any advertising. When Ashley said she had not, appellant asked her if she would like to talk about it with him. They agreed to meet at the fountain later that afternoon, and appellant asked if she was interested in

seeing his brother who allegedly played for the Clippers.

After they met at the fountain, they walked to the track office because appellant claimed he had a meeting with the track coach. As they were waiting, appellant told Ashley that he was from Nigeria, had gone to Oxford in England, and was a producer. Appellant also showed her a bank passbook, and asked her, "How much money should I put in your bank account? How about $600?" When Ashley asked why he would do that, appellant responded, "Well if you're going to ask why, I'm not going to do it. Who asks why?"

Appellant then told Ashley that he would take her shopping. Ashley stated that she did not want to go shopping with appellant or take his money because she did not know him. However, Ashley gave appellant her cell phone number.

Appellant and Ashley spoke briefly a few times on the phone. On February 18, 2002, appellant called her and told her he had just gotten a big check and that he was in Pasadena with Spike Lee for a movie opening. At first, Ashley did not want to meet him, but then reconsidered because she thought it would be in a public area. She agreed to meet him at The Gap clothing store in Pasadena. Once there, appellant told Ashley that she could purchase some items she had tried on, or he would just give her $500 in cash. When Ashley chose the cash, they drove in Ashley's car to a bank ATM machine. However, Ashley noticed that appellant had purportedly

gotten the money very quickly and then realized that the ATM machine was actually across the street from appellant.

Appellant got back into the car, and they went to a Starbucks where appellant bought some coffee for them both. When Ashley said she had to leave, appellant asked to be driven to a friend's house. However, appellant directed her to the parking lot of a Laundromat, which was sparsely lit and where no other cars were located. They talked for a few minutes, and then appellant touched Ashley on her leg. Ashley told appellant to stop and pushed his hand away. Appellant told Ashley, "I don't want to have sex with you. I just want to feel you. I want to be one with you."

Ashley turned the car engine on, and appellant told her to drive behind two buildings. She drove to the location, but made sure that the car could still be seen from the street. There were no lights, but there was a van parked nearby with a person standing next to it. When appellant took the keys out of the ignition, Ashley became scared. She asked for the keys back, but appellant would not give them to her and said, "You don't want to see me get angry. It's not a good thing for me to get angry." Appellant then said, "You want to leave here in peace and not in pieces, right?" He added, "this is going to happen tonight," and "This is a bad neighborhood," and "Do you know what wasting someone means?"

Ashley was terrified and shaking. Appellant told her to go

ahead and scream because no one would care. Ashley knew that appellant had the car keys, and surmised that because he knew the track coach at her school he could chase and catch her if she tried to run away. Just then a Pasadena police car pulled up behind Ashley's car, and the officer shined a bright light into her car. Pasadena Police Officer Diego Torres told appellant and Ashley that the area they were in was not safe and that they should leave. Ashley grabbed back her keys, jumped out of the car, and ran toward Officer Torres. She was nervous, shaken up and scared. Ashley told the officer about appellant's threats and asked him to help her. The officer asked appellant to get out of the car. Ashley drove away, and appellant walked away.

Approximately three weeks later, appellant called Ashley on her cell phone and told her she looked cute today. Ashley hung up the phone, but when she turned around a few minutes later, she saw appellant. Ashley left.

Count 7 re Yana J.

Yana J. attended Pasadena City College and worked in the physical education department there. Appellant was on the track team, and Yana had given him some equipment to use. In early February of 2002, appellant approached Yana as she waited for a friend. Appellant told her he was a prince in Nigeria, that he had money, and he could buy things for her. Appellant also made a comment about American women that

offended her, and Yana left when her friend arrived.

On February 13, 2002, Yana was walking on campus with her cousin when she overheard appellant tell another woman that he was [a] prince and had money. As Yana passed by, she commented that appellant was lying. Yana and her cousin then went into a gym building. While inside the gym and waiting for her cousin, appellant approached Yana, punched her hard in the chest causing her to fall back onto a desk, and threatened that, "If you say something else to her, I'm going to fucking kill you."

Yana filed a complaint with the campus police. Soon thereafter, as Yana and her cousin walked across the campus, appellant walked behind them and started cussing. Yana's cousin contacted the Pasadena Police on her cell phone. The police arrived and spoke with the campus police, who indicated that the incident had been handled.

Counts 8, 9 and 10 re Brittany H.

In March of 2002, Brittany H., who was 15 years old, went to meet her mother at Pasadena City College. Brittany went to the gym looking for her mother. As she left the gym, appellant approached her, and she recognized appellant as a friend of her mother's friend. Appellant offered her a ride home, and got into a car driven by appellant's friend, Jonathan.

As they drove, Brittany pointed out her house. But Jonathan did not stop the car. Appellant told Brittany that he needed to go to his house to get some money. Once they reached appellant's house, appellant told Brittany to get out of the car. She said she was fine in the car, but appellant asserted that Jonathan was going to leave and needed his car. Brittany kept asking if appellant was going to take her home.

Appellant took Brittany through the house and into his bedroom. She considered running out, but thought appellant or Jonathan would grab her. Brittany sat on the bed, and Jonathan gathered his things and left. Brittany kept asking appellant how he was going to get her home. She felt very scared. After Jonathan left the room, appellant turned off the lights, pushed Brittany down on the bed, and got on top of her. Appellant took off his shoes and started unbuckling Brittany's belt and unzipping her pants. Appellant took off his pants and with his boxer shorts still on began grinding his penis against Brittany's leg. She was scared and could not move.

When Brittany started to scream and cry, appellant asserted, "Bitch, you're going to let me do this." She screamed for appellant to get off her and hit appellant in the face. Appellant grabbed Brittany's breasts, squeezed them hard, and kissed her on the neck as she continued hitting him.

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Appellant eventually got off of Brittany and went to the bathroom. While he was in the bathroom, she ran out of the house. Appellant ran after her and shouted that she had purportedly stolen something from his house. When appellant caught up with Brittany, he asked why she ran away. She stated that she was scared and he had just attacked her.

At that moment, two people in a car drove by and asked if anything was wrong. Brittany got in the car, and the couple drove her to her grandmother's house. Brittany told her grandmother what had happened, and a friend later contacted the police.

Count 11 re Cheryl J.

Cheryl J. worked at Pasadena City College in the student loan and grants office and took classes at the college. Sometime during the last week in February, appellant approached Cheryl as she was leaving class and walking back to her office. Appellant told her he had been watching her and wanted to get to know her better. Appellant told her he was from Nigeria, had lived in London, and had a million and half dollars in a bank account. He showed her a bank passbook and his passport, which had the word "Prince" before his name.

When appellant said he wanted to get something to eat, Cheryl agreed to go with him when she was done with work.

Later, as Cheryl drove to the restaurant, appellant placed his hand on her thigh. She moved his hand away, but several minutes later, he placed his hand there again. Cheryl asked him to stop and moved his hand away again.

The following day, Cheryl and an African friend went to a restaurant with appellant. During their meal, appellant discussed his religious views toward women. He believed that women were evil and men had been placed in control of them for that reason. This conversation made Cheryl uncomfortable. Afterwards, she dropped appellant off at his house and told him she did not want to see him anymore.

Nevertheless, appellant continued to come by Cheryl's office on campus in an attempt to continue meeting with her. Many times Cheryl had the receptionist at the front desk tell appellant that she was not there. One day, appellant started screaming and yelling at Cheryl. She again told appellant she did not want to see him any more. Cheryl told the people in the front office area to keep the front door closed so appellant could not just walk into her office. A few days later, appellant came by Cheryl's office, and she hid under her desk to avoid contact with him.

On another occasion, appellant waited three hours outside Cheryl's office until she got off work. He wanted to walk Cheryl to her car. As they walked down the stairs, appellant grabbed Cheryl by the arms and kissed her on the

mouth. She pushed him away and told him to stop. Once they arrived at her car, appellant cursed at Cheryl.

Count 12 re Lauren C.

Lauren C. was a student at Pasadena City College. Appellant approached Lauren as she waited in line during the enrollment process at the college. Appellant told her that he worked at the school and had been watching her from his office. Appellant asked Lauren for her phone number, but she did not give it to him. Appellant told her he was a prince and showed her his passport. He also told her he had lots of money and showed her his bankcard. Appellant offered to take Lauren shopping or to give her money if she went out with him. Lauren repeatedly said no and told appellant that she was not interested.

As Lauren walked to her car, appellant followed her. He kept asking her for her phone number, and she refused to give it to him. When Lauren arrived at her car, opened the door and sat down, appellant crouched down next to the door. Lauren tried to close the door, but appellant kept pushing it open. Lauren repeatedly told him she had to leave. Appellant did not move away, and then he put his hand on her leg and stroked it up and down. When Lauren told him not to touch her, appellant stated, "The more you say no, the more I'm going to want to do it." Lauren became scared and just drove off, not caring if she injured appellant with the car.

Lauren immediately drove to see her father, who reported the incident to the Pasadena Police Department.

Defense evidence

Appellant's defense evidence at trial focused only on the counts pertaining to Brittany H. A former roommate of appellant's testified in part that he saw appellant and Brittany embracing and kissing on the bed, and that she did not appear to be in any distress.

PETITIONER'S CONTENTIONS

Petitioner contends:

1. Petitioner allegedly is actually innocent (Petition I, p. 5; Attachment to Petition I, pp. 1-5);

2. The evidence allegedly was insufficient to support Petitioner's conviction (Attachment to Petition I, pp. 5-8);

3. The State allegedly violated the "Vienna Convention,"[2] assertedly by failing to notify Petitioner's consulate of Petitioner's arrest and to inform Petitioner that he had a right to contact his consulate (Petition I, p. 6; Attachment to Petition I, pp. 12-13);

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[2] Vienna Convention on Consular Relations, 21 U.S.T. 77 (April 24, 1963).

4. The trial court's refusal to sever the counts allegedly violated Due Process (Petition I, pp. 5-6; Attachment to Petition I, pp. 8-9);

5. The trial court allegedly violated the Constitution by denying Petitioner's motion to substitute counsel made pursuant to People v. Marsden[3] (Attachment to Petition I, p. 11);

6. The trial court allegedly denied Petitioner his Constitutional right of self-representation (Petition I, p. 6; Attachment to Petition I, pp. 13-14);

7. Petitioner's jury allegedly was not drawn from a fair cross-section of the community (Attachment to Petition I, p. 15; Traverse, pp. 52-53);

8. The prosecutor allegedly violated the Constitution by assertedly using peremptory challenges to strike two African-American jurors in violation of Batson v. Kentucky[4] (Attachment to Petition I, pp. 15-16; Traverse, pp. 53-54);

9. Petitioner's trial counsel allegedly rendered ineffective assistance, assertedly by:

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[3] 2 Cal. 3d 118, 84 Cal. Rptr. 156, 465 P.2d 44 (1970).

[4] 476 U.S. 79 (1986).

a. failing to investigate witnesses and assertedly exculpatory evidence (Petition I, p. 6; Attachment to Petition I, pp. 9-10);

b. failing to object to the "insufficient evidence, bogus charges and the inconsistent statement [sic] offered by the state"; (Attachment to Petition I, p. 10);

c. lying to Petitioner and signing a request for a continuance in Petitioner's name (Attachment to Petition I, p. 10);

d. refusing to allow Petitioner access to transcripts and falsely telling the court that counsel had provided Petitioner with the transcripts (Attachment to Petition I, p. 10);

e. turning information over to the police which allegedly led to the filing of new charges against Petitioner (Attachment to Petition I, p. 10);

f. failing to object to the prosecution's allegedly discriminatory selection of jurors (Attachment to Petition I, p. 11); and

g. advising Petitioner not to testify (Attachment to Petition I, p. 11);

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10. Petitioner's appellate counsel allegedly rendered ineffective assistance, assertedly by failing to challenge on appeal:

a. the trial court's denial of Petitioner's request for self-representation;

b. state officials' alleged failure to inform Petitioner's consulate of Petitioner's arrest; and

c. the allegedly ineffective assistance of trial counsel in assertedly failing to investigate and prepare Petitioner's case (Petition II, p. 5; Attachment to Petition II, pp. 4-6; Traverse, pp. 61-64); and

11. Petitioner's upper term sentence allegedly violates Blakely and Cunningham (Petition II, p. 5; Attachment to Petition II, pp. 1-3; Traverse, pp. 55-61).

STANDARD OF REVIEW

A federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence

presented in the State court proceeding." 28 U.S.C. § 2254(d); Woodford v. Visciotti, 537 U.S. 19, 24-26 (2002); Early v. Packer, 537 U.S. 3, 8 (2002); Williams v. Taylor, 529 U.S. 362, 405-09 (2000).

"Clearly established Federal law" refers to the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision. Lockyer v. Andrade, 538 U.S. 63 (2003). "Clearly established Federal law" refers to the holdings, not dicta, of the United States Supreme Court at the time of the relevant state court decision. Carey v. Musladin, 127 S. Ct. 649, 653 (2006). "What matters are the holdings of the Supreme Court, not the holdings of lower federal courts." Plumlee v. Masto, ___, F.3d ___, 2008 WL 151273, at *6 (9th Cir. Jan. 17, 2008) (en banc).

A state court's decision is "contrary to" clearly established Federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts . . . materially indistinguishable" from a decision of the Supreme Court but reaches a different result. See Early v. Packer, 537 U.S. at 8 (citation omitted); Williams v. Taylor, 529 U.S. at 405-06.

Under the "unreasonable application prong" of section 2254(d)(1), a federal court may grant habeas relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." Lockyer v. Andrade, 538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537 U.S. at 24-26 (state court decision "involves an unreasonable application" of clearly established federal law if it identifies the

correct governing Supreme Court law but unreasonably applies the law to the facts). A state court's decision "involves an unreasonable application of [Supreme Court] precedent if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply, or unreasonably refuses to extend that principle to a new context where it should apply." Williams v. Taylor, 529 U.S. at 407 (citation omitted).

"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." Wiggins v. Smith, 539 U.S. 510, 520 (2003) (citation omitted). "The state court's application must have been 'objectively unreasonable.'" Id. at 520-21 (citation omitted); see also Clark v. Murphy, 331 F.3d 1062, 1068 (9th Cir.), cert. denied, 540 U.S. 968 (2003). In applying these standards, this Court looks to the last reasoned state court decision. See Medley v. Runnels, 506 F.3d 857, 862 (9th Cir. 2007). To the extent no such reasoned opinion exists, as where a state court rejected a claim in an unreasoned order, this Court must conduct an independent review to determine whether the decisions were contrary to, or involved an unreasonable application of, "clearly established" Supreme Court precedent. See Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000).

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DISCUSSION

For the reasons discussed below, the Petition should be denied and dismissed on the merits with prejudice.[5]

I. Petitioner Is Not Entitled to Habeas Relief on His Claim of Actual Innocence.

The Supreme Court has never decided whether a habeas petitioner may obtain relief by asserting a freestanding claim of actual innocence. In Herrera v. Collins, 506 U.S. 390, 400 (1993) ("Herrera"), the Court recognized that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state proceeding." The Herrera Court assumed, without deciding, "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal relief if there were no state avenue open to process such a

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[5] The Court has read, considered and rejected on the merits all of Petitioner's contentions. The Court discusses Petitioner's principal contentions herein.

The Court also assumes, arguendo, Petitioner has not procedurally defaulted any of his claims. See Lambrix v. Singletary, 520 U.S. 518, 523-25 (1997); Franklin v. Johnson, 290 F.3d 1223, 1229, 1232-33 (9th Cir. 2002); see also Barrett v. Acevedo, 169 F.3d 1155, 1162 (8th Cir.), cert. denied, 528 U.S. 846 (1999) ("judicial economy sometimes dictates reaching the merits if the merits are easily resolvable against a petitioner while the procedural bar issues are complicated").

claim," but ruled that the petitioner in that case had not made such a showing. Id. at 417. In House v. Bell, 126 S. Ct. 2064, 2086-87 (2006), the Court again declined to decide whether federal habeas courts may entertain freestanding claims of actual innocence.

The Supreme Court does permit a habeas petitioner to assert actual innocence as a "gateway" claim permitting consideration of an underlying procedurally defaulted constitutional claim. See Schlup v. Delo, 513 U.S. 298, 315 (1995) ("Schlup"). Under the Schlup standard, to show actual innocence sufficient to overcome a procedural default, a petitioner must furnish "'new reliable evidence . . . that was not presented at trial.'" See House v. Bell, 126 S. Ct. at 2077-78 (quoting Schlup, 513 U.S. at 324; ellipses added); Griffin v. Johnson, 350 F.3d 956, 963 (9th Cir. 2003), cert. denied, 541 U.S. 998 (2004). The petitioner must "show that, in light of all available evidence, it is more likely than not that no reasonable juror would convict him of the relevant crime." Smith v. Baldwin, 510 F.3d 1127, 1140 (9th Cir. 2007) (en banc) (citation and footnote omitted); see House v. Bell, 126 S. Ct. at 2077 ("A petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt - or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt."). This standard "is demanding and permits review only in the 'extraordinary' case." House v. Bell, 126 S. Ct. at 2077 (citing Schlup, 513 U.S. at 327).

The showing required to establish a freestanding claim of actual innocence is greater than that required to establish a Schlup

"gateway" claim. See House v. Bell, 126 S. Ct. at 2086-87 (holding petitioner satisfied Schlup actual innocence standard but did not meet the "extraordinarily high" standard required for proof of a freestanding claim of actual innocence); see also Schlup, 513 U.S. at 316. Therefore, to the extent Petitioner cannot satisfy the Schlup standard, he cannot satisfy the more exacting standard applicable to a freestanding claim of actual innocence.

To establish a freestanding claim of actual innocence, a petitioner must make a "stronger showing than the insufficiency of the evidence to convict" showing adopted by the Supreme Court in Jackson v. Virginia, 443 U.S. 307, 319 (1979). See Carriger v. Stewart, 132 F.3d 463, 476 (9th Cir. 1997) (en banc), cert. denied, 523 U.S. 1133 (1998); see also House v. Bell, 126 S. Ct. at 2078 ("the gateway actual-innocence standard is 'by no means equivalent to the standard of Jackson v. Virginia, [citation],' which governs claims of insufficient evidence") (citing Schlup, 513 U.S. at 330). The required showing "'must go beyond demonstrating doubt about [the petitioner's] guilt, and must affirmatively prove that he is probably innocent.'" Boyde v. Brown, 404 F.3d 1159, 1168 (9th Cir. 2005), amended on other grounds, 421 F.3d 1154 (9th Cir. 2005) (quoting Carriger v. Stewart, 132 F.3d at 476; footnote omitted). Post-conviction evidence serving only to "undercut the evidence presented at trial" does not suffice to meet this standard. Carriger v. Stewart, 132 F.3d at 477; see also Spivey v. Rocha, 194 F.3d 971, 979 (9th Cir. 1999), cert. denied, 531 U.S. 995 (2000) (habeas relief unavailable where "the totality of the new evidence does not undermine the structure of the prosecution's case").

In considering Petitioner's claim of actual innocence, the Court's analysis is not limited to the allegedly new evidence proffered by Petitioner. See House v. Bell, 126 S. Ct. at 2077 (applying less onerous Schlup gateway standard); Schlup, 513 U.S. at 327; Carriger v. Stewart, 132 F.3d at 478. Rather, the Court "must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it necessarily would be admitted under rules of admissibility that would govern at trial." House v. Bell, 126 S. Ct. at 2077 (citations and internal quotations omitted).

A. Charges Concerning Tiana W.

Petitioner contends evidence that Tiana W. made pretrial statements assertedly inconsistent with her trial testimony shows Petitioner's actual innocence of the offenses against Tiana. Petitioner also contends the nurse's medical report shows Tiana did not suffer any injuries, and that witnesses saw Petitioner and Tiana laughing, talking and making calls in front of Petitioner's house after the incident. Petitioner relies on the following allegedly new evidence:

1. A "Forensic Nurse Examiner Narrative," dated May 13, 2002, indicating that Tiana stated, after the incident, that she and Petitioner went to Petitioner's house and discovered he had been locked out (Petition I, Ex. A). Petitioner contends this evidence shows Tiana was expecting Petitioner to pay her for allegedly consensual sexual intercourse, and that Tiana lied at trial when she testified that she walked home after the incident

(Attachment to Petition I, pp. 1-3).

2. Handwritten notes allegedly recording Tiana's statements to a district attorney, purporting to show that Tiana was communicating with her boyfriend at 12:09 a.m. following the incident (Petition I, Ex. B-1). Petitioner contends this evidence shows Tiana would have told her boyfriend if she really had been raped (Attachment to Petition I, pp. 1-2).

3. Two pages appearing to be taken from a police report, dated May 13, 2002, which Petitioner contends show unspecified inconsistencies between Tiana's statement to police and her trial testimony (Petition I, Ex. B-2).

4. A Forensic Medical Report, dated May 13, 2002, purporting to record the result of the medical examination of Tiana, which Petitioner contends shows that Tiana suffered no "forcible trauma," scratches, bruises or redness (Petition I, Ex. I; Attachment to Petition I, p. 2).

5. Defense investigation reports, including a report purporting to record an interview with Bioma ("Boo") Faulkner, upon which Petitioner relies to show that Faulkner and another person, Casey Whiedon, saw Petitioner and Tiana sitting, talking and making calls in front of Petitioner's house in the early hours of May 13, 2002 (Petition I, Ex. H; Attachment to

Petition I, p. 4; Traverse, p. 11).[6]

This alleged new evidence is manifestly insufficient to meet the standard applicable to a freestanding claim of actual innocence. The alleged evidence that Tiana told the nurse Tiana walked to Petitioner's house after the incident does not suffice; the "Forensic Nurse Examiner Narrative" generally is consistent with Tiana's trial testimony describing the sexual assault. Alleged evidence that Tiana made a phone call to her boyfriend or to others after the incident does not suffice; Petitioner fails to provide any evidence to show that Tiana did not report the assault to the boyfriend or to anyone else to whom she assertedly made a call, but only speculates that she did not do so. In any event, a failure to report would not prove probable innocence. Petitioner offers two pages appearing to be from a police report which Petitioner contends show inconsistencies between Tiana's report to police and her trial testimony, but does not identify any particular inconsistency, much less any inconsistency which affirmatively shows Petitioner is actually innocent. See Carriger v. Stewart, 132 F.3d at 477 (rejecting freestanding claim of actual innocence where nearly all of alleged new evidence "serve[d] only to undercut the evidence presented at trial, not affirmatively to prove Carriger's innocence"); Sistrunk v. Armenakis, 292 F.3d 669, 674-75 (9th Cir. 2002) (en banc), cert. denied, 537 U.S. 1115 (2003) (rejecting Schlup claim based on impeachment evidence which did not fundamentally call into question the reliability of petitioner's

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[6] Petitioner spells Casey Whiedon's last name both as "Whiedon" and as "Wheidon" (see, e.g., Attachment to Petition I, pp. 4, 9). The Court uses the first spelling.

conviction); Clark v. Lewis, 1 F.3d 814, 824 (9th Cir. 1993) (evidence attacking credibility of prosecution witness insufficient to establish the defendant's actual innocence).

The Forensic Medical Report is not new evidence; it was admitted at trial (see R.T. 902, 909-10, 1263). Moreover, the Report records that Tiana suffered labial swelling and a vaginal abrasion or laceration, which the nurse testified were consistent with a recent sexual assault (see Petition I, Ex. I; see also R.T. 912-13, 921-22).

Finally, although Petitioner contends "Boo" and Casey saw Petitioner and Tiana laughing and talking at Petitioner's house after the incident, the evidence Petitioner offers in support of this assertion shows only that "Boo" assertedly told a defense investigator that "Boo" knew and liked Petitioner, that Petitioner would bring different girls to the house, that "Boo" did not think Petitioner was the type to force himself on a girl, that "Boo" did not know who Casey was, and that "Boo" had no names to give the investigator to "follow-up with" and "had nothing more to say" (Petition I, Ex. H, p. 1). This document falls well short of satisfying the exacting standard for a freestanding claim of actual innocence.

Therefore, Petitioner has not met his burden to show that he is actually innocent of the offenses against Tiana W.

B. Charges Concerning Yana J.

Petitioner contends that allegedly new evidence shows

Petitioner's actual innocence of the charge of battery on Yana (Traverse, pp. 8-9). Petitioner relies on an Pasadena City College Campus Police "Offense/Incident Report" and a "Pasadena Area Community College District Field Interview Card" (Petition, Ex. D), claiming that this evidence shows Yana J. falsely stated that Petitioner had punched her in the chest.

The "Offense/Incident Report" indicates the report was prepared on February 14, 2002 by Officer Hynes (Petition, Ex. D-1). This Report purports to record an incident on February 13, 2002 at "1000hrs" [10 a.m.] (id.). The report states that Reporting Officer Hynes received a call to take a battery report (id.). Yana told the reporting officer that Petitioner punched her in the chest earlier that day (Petition, Ex. D-1). During the interview, Petitioner entered the office and said he wanted to make a report concerning the same incident, naming Yana as the suspect (id.). Petitioner assertedly said he did not strike or touch Yana (id.). The report states: "I advised both parties that I would make a report of the incident describing the events as told to me and that the report would be submitted to our investigators for follow-up. The parties were also advised to leave each other alone and not to make contact with each other. I might also add that I did not see any bruising or redness to the exposed chest area of victim [Yana]. This area was visible to the naked eye." (Petition Ex. D-1).

The "Field Interview Card" records an interview with Petitioner on February 13, 2002 at "1323 hrs" [1:23 p.m.], and bears the names of Officers Hynes and Lester (Petition, Ex. D-2). It identifies Yana as

the "co-subject" (id.). Under the heading "Reason for Interview," the "Field Interview Card" states: "co-subj. RPT's 242 PC by subj. intv. indicates 242 PC complaint unfounded. R/P has history of sexual encounter with male athletes i.e. football & basketball players. Multiple encounters. Subj. had sex w R/P nite before, in GM bldg." (id.). The disposition states: "Subj. advised & F.I." (id.).

These documents do not show Petitioner's actual innocence of the battery on Yana. The "Field Interview Card" records Petitioner's statements in the field interview conducted the day before the "Offense/Incident Report" was prepared, and does not contain any conclusion that the interviewing officer, or any police officer, concluded that Yana's allegations were unfounded.

The "Offense/Incident Report" does not state that the reporting officer concluded that Yana was not punched, but states only that the officer did not observe any bruising or redness on the exposed part of Yana's chest. Yana testified at trial that the officer to whom she reported the incident asked Yana to pull down her tank top to see if there was a bruise (R.T. 983-94). Yana testified that there was no bruise, and that the officer said it looked like it could be red, but declined to take a picture (R.T. 984). Petitioner's counsel asked: "So as far as you can tell us today, nobody could see anything on your chest," to which Yana responded: "No, sir." (R.T. 984). The statements in the "Offense/Incident Report" are cumulative of this testimony and do not constitute "new evidence" supporting a claim of actual innocence. See Cooper v. Brown, 510 F.3d 870, 971 (9th Cir. 2007) (under Schlup, "Petitioner may not make a showing of actual

innocence based on what was known at the time of trial and presented to the jury. [citations]."); Houston v. Castro, 2003 WL 21056800, at *3 (N.D. Cal. May 8, 2003) (rejecting actual innocence exception to statute of limitations, where petitioner presented no new evidence of actual innocence, but only "the same evidence that the trial court considered"); see also Bannister v. Delo, 100 F.3d 610, 618 (8th Cir. 1996), cert. denied, 521 U.S. 1126 (1997) ("putting a different spin on evidence that was presented to a jury does not satisfy the requirements set forth in Schlup"; citations, internal quotations and brackets omitted); Gomez v. Jaimet, 350 F.3d 673, 680 (7th Cir. 2003) (same, citing Bannister v. Delo).

Therefore, Petitioner has failed to show that it is more likely than not that no reasonable juror considering the alleged evidence contained in the "Offense/Incident Report" or the "Field Interview Card" would have found Petitioner guilty of the battery of Yana J. beyond a reasonable doubt. See Carriger v. Stewart, 132 F.3d at 477; Sistrunk v. Armenakis, 292 F.3d at 674-75; Clark v. Lewis, 1 F.3d at 824. It follows that Petitioner has not satisfied the more stringent standards applicable to a freestanding claim of actual innocence with regard to the battery of Yana J. See House v. Bell, 126 S. Ct. at 2086-87.

C. Charges Concerning Lauren C.

1. Background

On direct examination, the prosecutor asked Lauren C. if she had